

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EQUAL EMPLOYMENT OPPORTUNITY )  
COMMISSION, )  
Plaintiff, )  
V. ) No. 09-CV-602-GKF-FHM  
ABERCROMBIE & FITCH STORES, )  
INC., an Ohio Corporation )  
d/b/a abercrombie kids, )  
Defendant. )

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HAD ON JULY 20, 2011

JURY TRIAL - VOLUME III

BEFORE THE HONORABLE GREGORY K. FRIZZELL, Judge

APPEARANCES:

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(APPEARANCES CONTINUED)

For the Defendant: Mr. Mark A. Knueve  
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PROCEEDINGS

July 20, 2011

(The following proceedings were had outside the  
presence and hearing of the jury.)

1           THE COURT: We are on the record outside the hearing  
2 of the jury. The Court has conducted an informal jury  
3 instruction conference and has made some modifications to its  
4 first proposed draft of jury instructions based upon those  
5 informal discussions. The Court has produced a second draft to  
6 counsel, and at this time the Court will ask counsel for the  
7 plaintiff, Ms. Hope, are there any objections to the Court's  
8 proposed set of jury instructions?

9           MS. HOPE: Your Honor, the plaintiff still needs a  
10 moment to review the revisions to the instructions.

11          THE COURT: All right. Mr. Clark, many objections?

12          MR. CLARK: Just a few briefly, Your Honor. On  
13 Instruction No. 3, where the Court's finding of liability is  
14 referenced. I just want to preserve for the record that we  
15 maintain our objections to that.

16          THE COURT: Of course.

17          MR. CLARK: By not objecting to the instruction, we'd  
18 lose that.

19          THE COURT: Yes.

20          MR. CLARK: The nominal damages instruction, which is  
21 now Instruction No. 13.

22          THE COURT: Yes, sir.

23          MR. CLARK: As we mentioned earlier, we believe that  
24 the language under the Tenth Circuit caselaw, the instruction  
25 should read "then you may return a verdict."

1 THE COURT: All right. And for some reason -- just  
2 one second. I don't have Instruction No. 13. It has fallen  
3 out.

4 MS. SEELY: It's now after 14.

5 MR. CLARK: It's actually been moved to after the  
6 punitive damages instruction.

7 THE COURT: Okay. All right, thank you.

8 MS. SEELY: I think it's just out of order in your  
9 stack.

10 MR. CLARK: It may make sense to change the order.

11 THE COURT: Yes, I think we'll switch -- put 13 in its  
12 proper place. All right, go ahead.

13 MR. CLARK: And then finally, with respect to the  
14 punitive damages instruction, which in the packet I have is  
15 Instruction No. 14.

16 THE COURT: Yes.

17 MR. CLARK: We had proposed a model instruction,  
18 defendant's proposal 2.02 that was based upon the model  
19 punitive damages instruction in a case such as this.

20 THE COURT: Yes.

21 MR. CLARK: And we maintain our position that that's  
22 the appropriate instruction and that the applicability of the  
23 undue burden defense should be incorporated into the  
24 instructions to the jury.

25 THE COURT: All right. And specifically, that was a

1 model jury instruction adopted by the Litigation Section of the  
2 ABA at some point; is that correct?

3 MR. CLARK: That's correct, Your Honor.

4 THE COURT: All right. And specifically, as I  
5 understand your argument, it would incorporate a slightly  
6 different undue burden defense in the context of punitive  
7 damages; correct?

8 MR. CLARK: That's correct, Your Honor. It's our  
9 position that under Kolstad, if the defendant reasonably  
10 believes that liability was not present or that Title VII did  
11 not prohibit the conduct it engaged in, it can't be found  
12 liable for punitive damages, even if the court later finds that  
13 conduct was in violation of Title VII.

14 THE COURT: Well, that's an interesting issue. I  
15 mean, it basically allows defendants to raise the same defense  
16 with respect to punitive damages in a separate defense, but  
17 very similar to the defense raised on liability.

18 MR. CLARK: Certainly, Your Honor. And in a classic,  
19 you know, race discrimination case under Title VII where  
20 defendant is found to have intentionally discriminated on the  
21 basis of race, that's not going to be particularly applicable  
22 because it's hard to argue that we believe we can discriminate  
23 lawfully against someone based on their race.

24 However, in a case such as this where there's, you  
25 know, it's a requirement for accomodation, but the requirement

1 for accommodation can be overridden by an existing undue  
2 burden, a defendant that reasonably believes that an undue  
3 burden is present, is not acting recklessly with respect to the  
4 protected rights, but is making a reasonable decision based on  
5 what it believes the law to be.

6 THE COURT: I understand.

7 MR. CLARK: So our position would be that the jury  
8 should be instructed as to the availability of that defense.

9 THE COURT: Yes, sir.

10 MR. CLARK: And then I guess, additionally, as to the  
11 good faith defense raised in Kolstad, as we mentioned this  
12 morning, it's our position that that defense is not an  
13 affirmative defense and not one that the burden should be  
14 allocated to the defendant to prove. And as to the specific  
15 language, we would preserve our language in our proposal, which  
16 was --

17 THE COURT: Yes, sir, and just for the record here, I  
18 was told this morning in the informal conference by Ms. Hope  
19 that five circuits have determined that it is, in fact, an  
20 affirmative defense and I was told this morning that no  
21 circuits have decided to the contrary. Is that your  
22 understanding?

23 MR. CLARK: That is, Your Honor.

24 THE COURT: All right. Go ahead.

25 MR. CLARK: And I guess, finally, as to the good faith

1 defense further, as we mentioned this morning, is the case of  
2 Hardman vs. Autozone, which we believe is consistent with our  
3 proposed language on the good faith defense.

4 THE COURT: Yes, sir. All right.

5 MR. CLARK: I think those are the extent of the  
6 defendant's objections.

7 THE COURT: Thank you, those are noted. And any  
8 objections from the plaintiff?

9 MS. HOPE: Your Honor, plaintiffs offer Plaintiff's  
10 Requested Instruction No. 37.

11 THE COURT: All right. We touched briefly on agency  
12 concepts in the informal instruction conference this morning  
13 and the Court determined that because the language, and I think  
14 it's from Kolstad, with regard to managerial agents is slightly  
15 different in the context of punitive damages, that we would take  
16 out the Court's typical agency instruction and we would rely on  
17 the language set forth in the punitive damage instruction with  
18 regard to vicarious liability and agency; right?

19 MS. HOPE: I did also want to note, Your Honor, for  
20 the record that while I did indicate there were five circuits  
21 that have found that the Kolstad good faith defense is  
22 affirmative, I did not know of any that had not.

23 THE COURT: Yes, that was my understanding. Yes.  
24 Thank you.

25 MS. HOPE: Thank you.

1 THE COURT: Any other objections?

2 MS. HOPE: No, Your Honor.

3 THE COURT: Very well. We will make copies of these  
4 for each of the jurors. It is my practice to allow the jurors  
5 to have an individual copy and take that copy back into  
6 deliberations with them. It should not take very long and we  
7 will be back here as soon as possible.

8 Now, how much time do you wish to use in closing?

9 MS. SEELY: Your Honor, my understanding from Mr.  
10 Overton was that we had a half an hour and could ask for more?

11 THE COURT: No, half an hour, as a colleague of mine  
12 who was chief judge in Tulsa County used to say, the United  
13 States Supreme Court reserves a half an hour per side in the  
14 most important cases in this country and this ain't one of  
15 them. But if you need a half an hour, if that's what you were  
16 planning on.

17 MR. KNUEVE: Your Honor, I was planning on 10 to 15  
18 minutes.

19 THE COURT: Well, I think more than 15 might be  
20 appropriate here. Do you have 30 minutes plotted out here?

21 MS. SEELY: I do, Your Honor. I kind of thought that  
22 that's what I would get.

23 THE COURT: I was thinking more in terms of 20 here,  
24 per side.

25 MR. KNUEVE: I have no objection to 20, Your Honor.



1 MS. SEELY: Your Honor, I would ask for -- I would ask  
2 for 30 and reserve five out of that 30 for rebuttal. I can do  
3 my best to talk fast, but I did think we were going to get 30  
4 minutes.

5 THE COURT: All right. Well, based upon the  
6 representation, we will give you the 30. Use them at your  
7 peril. See if you can be a little faster than that, if you  
8 can.

9 MS. SEELY: I'll try to do that.

10 THE COURT: All right. Anything else?

11 MR. KNUEVE: No, Your Honor. Thank you.

12 THE COURT: All right, thank you very much.

13 (Recess).

14 (The Court instructed the jury.)

15 \* \* \* \* \*

16 THE COURT: Ladies and gentlemen, at this time we will  
17 hear closing arguments of counsel. Now, under our procedures,  
18 the plaintiff, who bears the burden of proof on the plaintiff's  
19 case, has both the opportunity to begin closing arguments and  
20 to offer a short rebuttal after the defendant's lawyer has  
21 spoken to you. Ms. Seely has opted to reserve five minutes of  
22 her time for rebuttal. We have allowed the attorneys, if they  
23 wish, to utilize up to 30 minutes for closing argument.

24 So Ms. Seely, when you are ready, you may begin.

25 MS. SEELY: Ladies and gentlemen of the jury, thank

1 you for your time and attention in this matter. Juries are the  
2 cornerstone of our American justice system and your  
3 participation is much appreciated by myself and I'm sure by  
4 everyone in this room.

5 This case is it about colors. It's about green  
6 because green is the color of money and that's what the Look  
7 Policy is all about. And it's about green because Randall  
8 Johnson said anyone can paint themselves green and call it a  
9 religion when Heather Cooke told him that Samantha Elauf wore a  
10 headscarf because of her religious beliefs. And it's about  
11 red, white and blue, because Samantha Elauf in June of 2008 was  
12 a typical American teenager when she applied for a job with  
13 Abercrombie at the age of 17. And it's about red, white and  
14 blue because in 1964, the United States Congress passed Title  
15 VII of the Civil Rights Act to protect the rights of applicants  
16 and employees to religious accommodation in the workplace.  
17 Please think about these colors when you retire to the jury  
18 room.

19 Samantha Elauf. Who was she before she applied for a  
20 job with abercrombie kids and who is she now and how has she  
21 changed? In June of 2008, Samantha was a typical American  
22 teen. She was 17 years old, lived at home with her family, had  
23 a messy room, she likes Taylor Swift, she hangs out with  
24 friends and her favorite activity is shopping for clothes. She  
25 worked at the mall in high school and she has dreams. She

1 hopes to open a women's retail fashion store when she grows up.  
2 She wears a headscarf because she is Muslim, as a sign of her  
3 faith.

4 Samantha applied for a job with abercrombie kids and  
5 she knew she was qualified and she was really excited to work  
6 there. It was a cool store, her best friend Farisa worked  
7 there and she got a great discount on clothes. And she thought  
8 she had the job because she had had retail experience with  
9 Limited Too. And she had never been discriminated against  
10 before that time.

11 She was just like any other 17 year old until  
12 Abercrombie & Fitch rejected her for a job because of her  
13 headscarf, because of who she was.

14 Now this trial, the Court has instructed you, is on  
15 damages only and your job is to determine what monetary damages  
16 are due to Samantha Elauf and how much to award.

17 The Court read a number of instructions to you and  
18 they are all important, but I wanted to talk about one in  
19 particular and that's the instruction regarding burden of  
20 proof. The Court -- and I think at the beginning of this  
21 trial, the Court reminded you that the burden of proof in a  
22 civil trial such as this is not beyond a reasonable doubt.  
23 That is a burden of proof applicable in criminal trials and  
24 that is not what you're going to be deciding here, that's not  
25 the standard you will be using.

1           The burden of proof that is in your instruction that  
2     the Court just read is that any party who is proving a claim or  
3     defense must prove that claim or defense by the greater weight  
4     of the evidence. And that means that the party must prove that  
5     the claim is more likely, the claim or defense is more likely  
6     to be true than not to be true.

7           Think of it as a scale. If the scale tips, even  
8     slightly to one side with the evidence, the party has satisfied  
9     its burden of proof by the greater weight of the evidence.

10          Now, the EEOC is asking for two types of damages in  
11     this case. We are asking first, for compensatory damages to  
12     compensate Samantha Elauf for her emotional distress. The  
13     instruction you have received is that you can award compensatory  
14     damages for emotional pain, emotional suffering, mental anguish,  
15     inconvenience, humiliation or embarrassment. The plaintiff  
16     does not have to prove that Samantha Elauf suffered all of  
17     these things, only one or more.

18          Now, why should you award compensatory damages to  
19     Samantha Elauf? Ms. Elauf testified that she considered  
20     herself to be an American teen and she had no reason not to  
21     feel that way before June of 2008. She had worn a headscarf  
22     since the age of 13 and had never been discriminated against in  
23     her life, not in work. She wore a headscarf at work for over a  
24     year, she had never had a problem there. She went to an  
25     American high school. She had never had any problem in her

1 personal life, no discrimination because of her headscarf. It  
2 never occurred to her that anyone thought she was different.  
3 It never occurred to her that she couldn't do anything she  
4 tried to do. She was excited about her job with Abercrombie,  
5 she wanted to work in the coolest store in the mall. Everyone  
6 was wearing the clothes, she testified. And like most teens,  
7 she wanted to be cool, she wanted to fit in and be like  
8 everybody else.

9 Then she found out she was not being hired because she  
10 wore a headscarf because of her religion, because of who she  
11 was. She was angry, she felt disrespected and insulted, and  
12 most of all she felt different from all the other teenagers  
13 because of her religion, because of who she was. She was a 17  
14 year old girl at that time, in her formative years. No teen  
15 wants to feel different. We've all been there. We all wanted  
16 to fit in and be like everybody else. And Abercrombie told her  
17 that she couldn't work in the cool store, she didn't have the  
18 look because she wore a headscarf.

19 The most compelling evidence that you should consider  
20 in deciding whether to award compensatory damages and how much,  
21 was Samantha Elauf's reaction to my question when she was on  
22 the witness stand, how did it make you feel. You remember, she  
23 couldn't speak for 20 seconds. You could see that she was  
24 welling up with tears. And it's been over three years, but  
25 these things, but the things that happen to you when you're a

1 teenager stick with you for a long time and she obviously still  
2 feels the pain, and it's not surprising, and she will continue  
3 to feel it for a long time, maybe the rest of her life. She  
4 lives with the feeling that people judge her now, that when  
5 they look at her, they see only her scarf and not who she  
6 really is.

7           You can help her by sending a message that you  
8 understand the way she feels by awarding her damages to  
9 compensate her for her emotional distress.

10           Now, Abercrombie's attorney will tell you that you  
11 should not award any damages, any compensatory damages, to Ms.  
12 Elauf because she found another job within about five days at  
13 Forever 21 and that she didn't see a doctor or a therapist and  
14 she didn't take any pills. That doesn't matter. The fact that  
15 she got another job within a few days did not erase the pain of  
16 being made to feel different. She found comfort with her  
17 family and friends and did not need to see a therapist or a  
18 counselor and she certainly didn't need to take pills at the  
19 age of 17.

20           Emotional pain, suffering, mental anguish. These are  
21 high-sounding words, but I want you to consider them from  
22 Samantha Elauf's point of view. 17-year old teen,  
23 discriminated against for the first time because of her  
24 religious beliefs, beliefs that are intrinsic to her being.  
25 She wears a headscarf as a sign of her faith. That experience

1 will be with her forever and, ladies and gentlemen, I submit  
2 that the scales tip towards the plaintiff's evidence.

3 Now, we're also going to be asking you to award  
4 punitive damages. And the purpose of punitive damages is to  
5 punish an employer and to deter an employer from doing -- from  
6 discriminating again.

7 The plaintiff must show by the greater weight of the  
8 evidence that Abercrombie acted with reckless indifference to  
9 the federally protected rights of Samantha Elauf when it  
10 discriminated against her. The plaintiff must show by the  
11 greater weight of the evidence, that Abercrombie acted with  
12 reckless indifference if it acted with knowledge that it might  
13 be acting in violation of Title VII.

14 Now, what evidence should you look at? Remember the  
15 stipulation that was read at the beginning of the trial?  
16 Abercrombie stipulated that at all relevant times it knew that  
17 Title VII required it to provide religious accommodation to its  
18 applicants and employees.

19 THE COURT: Just one second, Ms. Seely. We will  
20 suspend your time. Your opposing counsel can't see this on --

21 MR. KNUEVE: I can see it just fine. May I approach,  
22 Your Honor?

23 THE COURT: All right. I'm sorry, I misunderstood.  
24 You have an objection, sir?

25 (Whereupon counsel approached the bench and the

1 following proceedings were had out of the hearing of the jury.)

2 MR. KNUEVE: Your Honor, we were not provided with  
3 that document. Mr. Overton was very explicit that  
4 demonstrative exhibits needed to be exchanged. We've never  
5 seen this document.

6 MS. SEELY: Your Honor, it's not an exhibit. It's  
7 simply a visual aid. I did not realize we had to do that with  
8 things we would use in closing.

9 MR. KNUEVE: Your Honor, Mr. Overton was very explicit  
10 about demonstrative exhibits, he said they had to be exchanged.  
11 We have not been provided this document.

12 THE COURT: Well, a demonstrative exhibit, arguably,  
13 is different from highlighting one's closing arguments.  
14 Obviously, Ms. Seely could pull out a board and a marker and  
15 write these things down. Is that essentially what you're  
16 trying to do --

17 MS. SEELY: That's exactly right, Your Honor.

18 THE COURT: -- just summarize your argument.

19 MS. SEELY: Summarizing my four points.

20 THE COURT: It will be overruled.

21 (Whereupon counsel returned to their respective places  
22 and the following proceedings were had within the presence and  
23 hearing of the jury.)

24 THE COURT: The objection is overruled. Ms. Seely.

25 MS. SEELY: Again, what evidence should you look at to



1 determine if Abercrombie knew that it was acting with reckless  
2 indifference to Samantha Elauf's rights. Remember the  
3 stipulation. Abercrombie knew at all times that it was  
4 required to provide religious accommodation, by Title VII, to  
5 its applicants and employees.

6           Number two, district manager Randall Johnson  
7 instructed his assistant manager, Heather Cooke, not to hire  
8 Samantha because she wore a headscarf. When Heather Cooke told  
9 him that she wears it for religious reasons, he said you still  
10 can't hire her because someone can come in and paint themselves  
11 green and say they were doing it for religious reasons and we  
12 can't hire them. To Randall Johnson, a scarf was no different  
13 than a cap, a hat, or a helmet, that's what he testified to.  
14 This was reckless indifference.

15           Number three. Randall Johnson had been trained in the  
16 interview process. He knew that Samantha could not be hired if  
17 she was given a number one rating in appearance and sense of  
18 style on her rating sheet in the Model Group Interview Guide.  
19 So he told Heather Clark to change the rating, to cover it up.  
20 He knew what he did was wrong, otherwise he would not have  
21 attempted to cover up his conduct. Assistant manager Heather  
22 Cooke threw away Samantha's original interview rating document  
23 and falsified a new one, again to cover up what had happened.

24           Heather Cooke had a feeling this was going to be a  
25 problem, that's what she testified to. She knew it was wrong,

1 she knew it was discrimination, but she didn't want to lose her  
2 job. This was reckless indifference.

3 Now you need to consider the credibility of the  
4 witnesses. You have received an instruction on that.  
5 Abercrombie's attorney will tell you that Randall Johnson  
6 denied making the comment about green and that he denied  
7 instructing Heather Cooke to falsify the records. But you need  
8 to consider his credibility. He had reason to lie to cover up  
9 his wrongdoing, and you know that he lied to you when he was on  
10 the witness stand. He told you that he had left Abercrombie  
11 because he was laid off in a downsizing, but director of stores  
12 Chad Moorefield testified that Randall Johnson was fired for  
13 poor performance in April of 2009.

14 Consider Heather Cooke's credibility. She testified  
15 to what she did, even though she knew it was wrong. She, too,  
16 like Randall Johnson, had a reason to lie to protect herself,  
17 but she didn't, she told you the truth. But you can't view  
18 Randall Johnson and Heather Cooke's action in a vacuum. You  
19 should also attribute Abercrombie's reckless indifference to  
20 human resources in corporate headquarters in Ohio. Human  
21 resources designed the interview and hiring procedures, which  
22 resulted in applicants who needed to wear religious headwear as  
23 an accommodation, from being screened out and not being hired.  
24 Managers were trained that only human resources could authorize  
25 a religious accommodation. Managers were trained to contact

1 human resources only if an applicant made a request for  
2 religious accommodation during the interview. Managers were  
3 trained not to contact human resources if no request for  
4 religious accommodation was made. So why didn't Samantha Elauf  
5 ask for religious accommodation? Because Abercrombie set up  
6 the interview process so that people like Samantha Elauf, who  
7 wore a headscarf, would not know that they needed to ask for an  
8 accommodation. They never told the applicants that they  
9 couldn't wear headwear during the interview or before the  
10 interview on the kiosk application. This was reckless  
11 indifference.

12 Managers were not supposed to raise the subject of  
13 religion during interviews or take notes if the subject came  
14 up. Managers were not supposed to make assumptions if someone  
15 came in wearing religious headwear. They were not supposed to  
16 assume that the person would need to wear it on the sales  
17 floor.

18 Applicants did not have to be in compliance with the  
19 Look Policy during the interview. Deon Riley testified to that  
20 and so did Dr. Lundquist. But nonetheless, the manager was  
21 supposed to consider the applicant's headscarf in evaluating  
22 her appearance and sense of style. And you heard Deon Riley  
23 testify that a headscarf was inconsistent with the Abercrombie  
24 style. And under the interview guide, the applicant had to be  
25 given a one rating in appearance and sense of style if she was

1 wearing clothing that was inconsistent with the Abercrombie  
2 style. And an applicant with a one rating in appearance and  
3 sense of style could not be recommended for hire. This is how  
4 every interviewing manager was trained corporate-wide and this  
5 is what happened to Samantha Elauf. She didn't make a request  
6 for religious accommodation, for an exception to the Look  
7 Policy during her interview because she didn't know she needed  
8 to. Because she didn't make a request, it was never considered  
9 for her.

10 Now, Heather Cooke did exactly what she was trained to  
11 do. She reached out to her district manager, Randall Johnson,  
12 and district manager Randall Johnson did exactly what he was  
13 trained to do, to not contact human resources because Samantha  
14 was not in compliance with the Look Policy and had not  
15 requested an exception to the Look Policy.

16 Abercrombie will tell you that Randall Johnson was  
17 rogue manager. He was not. He did what he'd been trained to  
18 do. If someone complains about discrimination, roll it up to  
19 HR. If you have a question about the Look Policy, roll it up  
20 to HR. If an applicant raises religion, report it to HR. If  
21 an applicant requests religious accommodation, roll it up to  
22 HR. Otherwise, don't call. This is reckless indifference,  
23 ladies and gentlemen.

24 If Heather Cooke had followed the interview process  
25 and not made any assumptions about Samantha Elauf's headscarf,

1 Samantha Elauf would not have been hired and nobody would have  
2 been any the wiser.

3 Plaintiff must prove by the greater weight of the  
4 evidence that Randall Johnson and Heather Cooke were acting in  
5 a managerial capacity and were acting within the scope of their  
6 employment when they discriminated against Samantha Elauf. The  
7 evidence is clear that they were both managers. Randall  
8 Johnson, was a district manager responsible for seven stores  
9 with over a hundred employees at each store. He had the  
10 authority to hire, fire and discipline. Deon Riley testified  
11 that Randall Johnson, as a district manager, had the authority  
12 to give store management advice and assistance with questions  
13 on hiring, interviewing and the Look Policy.

14 Heather Cooke was responsible for interviewing and  
15 hiring models in the Woodland Hills store. She had the  
16 authority and obligation to seek advice from her district  
17 manager if she had a question about hiring or the interviewing  
18 process. Both were managers and both were acting within the  
19 scope of their employment when they refused to give Samantha  
20 Elauf a job because of her headscarf.

21 Now, you heard Deon Riley testify for the defendant  
22 that the Look Policy was critical to the business strategy by  
23 advertising the clothing through the in-store experience. In  
24 2008, Abercrombie & Fitch employed approximately a hundred  
25 thousand models. I submit to you that allowing Samantha Elauf

1 to work at the Woodland Hills store wearing a headscarf would  
2 not have damaged the Abercrombie brand. And remember,  
3 Abercrombie did make exceptions to the Look Policy, but the  
4 exceptions were made only for employees who knew they had to  
5 ask and Abercrombie made those exceptions when they had to and  
6 they are still going strong.

7 Did Abercrombie act with reckless indifference to the  
8 federally protected rights of Samantha Elauf to be free of  
9 religious discrimination and to be provided with religious  
10 accommodation, when it refused to hire her? Ladies and  
11 gentlemen, I submit to you the evidence clearly tips the  
12 scales.

13 Now Abercrombie -- if you determine that Abercrombie  
14 acted with reckless indifference to Samantha Elauf's rights,  
15 Abercrombie can avoid liability for punitive damages only if it  
16 proves that it made a good faith attempt to comply with Title  
17 VII's requirement that it must provide religious accommodation  
18 to its applicants and employees. The defendant bears the  
19 burden of proving by the greater weight of the evidence that it  
20 made good faith attempts to comply with the law. I submit to  
21 you, ladies and gentlemen, the evidence is clear that it did  
22 not meet that burden. It cannot meet that burden. The  
23 defendant, Abercrombie, did not have a religious accommodation  
24 policy in the stores. It had one in HR in Ohio, in cooperate  
25 headquarters.

1           Abercrombie did not train its managers in the stores  
2           about religious accommodation and the company's obligation to  
3           provide it. And Abercrombie did not enforce the -- or did not  
4           pursue violations of the religious accommodation policy when it  
5           knew violations had occurred.

6           What policy is most important to Abercrombie & Fitch?  
7           The Look Policy. The religious accommodation policy was only  
8           in HR at corporate. Only HR could decide whether or not  
9           religious accommodations could be granted. And Deon Riley  
10          testified that the company had too many store managers, too  
11          much turnover and the company really couldn't trust them to  
12          handle these matters. So the policy was to roll it up, but  
13          only if the applicant or employee asked for an accommodation.  
14          And once in HR, pursuant to the religious accommodation policy,  
15          the request was considered on a case-by-case basis.

16          It is clear that there was no training by HR for store  
17          managers about religious accommodation and how to recognize  
18          religious accommodation issues. You heard four managers  
19          testify they did not receive training in religious  
20          accommodation. And we're going to look at their testimony  
21          again now.

22                 "Question: Do you remember at any time while you  
23                 worked for Abercrombie & Fitch having any training in religious  
24                 accommodation?

25                 "Answer: No.

1           "Question: Now, when I say the phrase religious  
2 accommodation to you, do you know what that means, do you have  
3 any impression in your head what that means?

4           "Answer: Yes, I believe it means that, within a  
5 certain parameter, like people are allowed certain permissions,  
6 special permissions, depending on their religious beliefs.

7           "Question: And did you ever get any training in that  
8 topic while you worked for Abercrombie?

9           "Answer: I cannot remember.

10          "Question: And as to any -- your training, do you  
11 recall any actual training on religious accommodation?

12          "Answer: Any trailing?

13          "Question: Any training?

14          "Answer: Besides just to roll it up to HR and they  
15 make the decision, that's it."

16          You heard Deon Riley admit that none of the training  
17 documents we looked at during the trial made any mention of  
18 religious accommodation. She said managers were trained to  
19 call HR if there was any question or issue about religion, but  
20 you have no evidence of this other than her testimony? Ms.  
21 Riley is group vice president of human resources, ultimately  
22 responsible for what happened here today. You should consider  
23 her testimony in light of this.

24          Ms. Riley testified that a store manager, that store  
25 managers were trained to call HR when a request for



1 accommodation was made, but not otherwise. There would be no  
2 need to call, she said. Deon Riley summed it up. We don't  
3 train our managers to be HR experts.

4 This case is about colors, ladies and gentlemen.  
5 Green is the color of money, and Abercrombie & Fitch's Look  
6 Policy and its refusal to grant Samantha Elauf an exception to  
7 the Look Policy was all about money. To make money,  
8 Abercrombie adopted a business model that required its store  
9 employees to look like cookie cutter kids. Now, Abercrombie  
10 has a right to make money, we don't argue that, that's  
11 American, too, but not at Samantha Elauf's expense, not when  
12 the result is to tell a 17 year old that she is not like  
13 everybody else because of her religion and not at the expense  
14 of other applicants and employees to be free from religious  
15 discrimination. Those rights are guaranteed by Title VII of  
16 the Civil Rights Act and only you, ladies and gentlemen of the  
17 jury, can make this right. Only you can tell Samantha Elauf  
18 that you understand what she went through and you understand  
19 her emotional distress. Only you can send a message to  
20 Abercrombie that its discriminatory conduct matters and that  
21 laws prohibiting discrimination, passed by the United States  
22 Congress, cannot be trumped by money. Please send this message  
23 to Abercrombie with your verdict in this case. Thank you.

24 THE COURT: Thank you, Ms. Seely. Mr. Knueve.

25 MR. KNUEVE: Ladies and gentlemen of the jury, like

1 Ms. Seely, I thank you very much for your service and I thank  
2 you very much for your attention during this trial.

3 Now, in my opening statement, I told you that the  
4 evidence would show two things. First, that this whole  
5 situation was caused by a bad communication, but not by bad  
6 people or by bad policies; and second, that Ms. Elauf had no  
7 damages that were caused by Abercrombie and that's exactly what  
8 all the evidence has shown.

9 Now, the judge has instructed you on the law on  
10 damages and he told you that the EEOC is seeking two types of  
11 damages in this case, compensatory damages and punitive  
12 damages, and I want to talk about punitive damages, first.

13 There's absolutely no basis to award punitive damages  
14 in this case. The judge has instructed you that you can award  
15 punitive damages only if you first find that Abercrombie's  
16 managers were recklessly indifferent to Ms. Elauf's rights.  
17 Even then, if you find that the managers acted in violation of  
18 Abercrombie's policies, you cannot award punitive damages.

19 In other words, in order to award punitive damages you  
20 would first have to find some pretty serious violations of the  
21 law, and there's no evidence of that type of problem here.  
22 There was no evidence that anyone called Ms. Elauf any names or  
23 was rude or mean to her. There was no evidence that Abercrombie  
24 dislikes Muslims. In fact, Ms. Elauf's best friend, Farisa  
25 Sepahvand, was Muslim and testified that she was hired by

1 Abercrombie on the spot. Ms. Sepahvand stayed at Abercrombie  
2 for a long time, including after Ms. Elauf's interview. And  
3 you heard evidence that Abercrombie has made religious  
4 accommodations for other Muslim employees. There's no evidence  
5 that anyone at Abercrombie dislikes Muslims.

6 All of the evidence is that this was a  
7 miscommunication, and the miscommunication started with Ms.  
8 Elauf. She bears some of the responsibility here. Her best  
9 friend, Farisa Sepahvand, testified here in front of you under  
10 oath that Ms. Elauf knew there was a Look Policy before she  
11 even interviewed with Abercrombie. And that only makes sense,  
12 Ms. Elauf shopped at Abercrombie a lot, she had friends at the  
13 store. Her best friend worked at the store and complained all  
14 the time that she couldn't wear black at work. Her best friend  
15 also told her that she would have to wear the Abercrombie style  
16 and that the job title was model. You have seen how much this  
17 company emphasizes the Look Policy. Does anyone really believe  
18 that Ms. Elauf had no idea about the Look Policy?

19 Now, at interview, Ms. Elauf was read the closing  
20 instructions by Heather Cooke. And you've seen the closing  
21 instructions. They include a brief description of the Look  
22 Policy including a section that says that the model has to have  
23 a natural hair style. Ms. Cooke asked Ms. Elauf if she had any  
24 questions about the company's expectations. Ms. Elauf never  
25 mentioned her hijab or that she was Muslim. Ms. Elauf was even

1 asked about the meaning of the word diversity and never  
2 mentioned her hijab or her religion.

3 Ask yourselves, if you were applying for a model job  
4 with a company that you know has a strict dress code and you're  
5 wearing a religious symbol that's important to you and you've  
6 never seen anyone else at the store wear that symbol, wouldn't  
7 you at least mention it? Wouldn't you ask a question?

8 After the interview, Ms. Elauf testified that she  
9 didn't think the decision was fair, but she never called human  
10 resources, she never called Randall Johnson. Ms. Sepahvand,  
11 Ms. Elauf's best friend who testified here, testified that when  
12 she and Ms. Elauf bumped into Heather Cooke at the mall after  
13 the decision was made, Ms. Elauf didn't even ask Heather Cooke  
14 about the interview, even though Ms. Elauf and Ms. Cooke were  
15 friends. Now if you were that upset, wouldn't you ask a  
16 question?

17 Now, Ms. Cooke also had some bad communication. She  
18 made an assumption about Ms. Elauf's religion. And as Ms.  
19 Seely told you, if she hadn't made that assumption, we wouldn't  
20 be here. But guess what, she was trained not to make an  
21 assumption. She made an assumption in violation of  
22 Abercrombie's policies.

23 Ms. Sepahvand also had some bad communication because  
24 she also failed to call HR. If Ms. Sepahvand thought something  
25 was wrong or unfair or if Ms. Cooke thought something was wrong

1 or unfair, they had both been trained to call HR on the toll  
2 free number. They didn't do it. And I'll refer you, when you  
3 go back, to Defendant's Exhibits 6 and 8, they both clearly  
4 state if you think something is in violation of federal law,  
5 call HR. They didn't call HR, in violation of Abercrombie's  
6 policies.

7 Now, there was also some bad communication between  
8 Heather Cooke and Randall Johnson. And Ms. Cooke says that she  
9 told Mr. Johnson that there was a religious issue here. Mr.  
10 Johnson said, no, Heather Cooke never said that. Ms. Seely  
11 called Mr. Johnson an liar. Why would Mr. Johnson lie? He was  
12 no longer employed by Abercrombie & Fitch at the time of his  
13 deposition. He's not an individual defendant here. He has no  
14 reason to lie about this at all. Heather Cooke is a friend of  
15 Ms. Elauf. Heather Cooke is a friend of Ms. Sepahvand.  
16 Heather Cooke had numerous Look Policy violations herself.  
17 Heather Cooke also no longer works at Abercrombie.

18 Weighing who do you think is telling the truth and who  
19 wasn't. Personally, I think this was just bad communication.  
20 I think that there was a bad conversation and I'm not going to  
21 call either one of them a liar. But there are some things that  
22 are true, that are very clear. If Mr. Johnson said the things  
23 that Ms. Seely claims that he said, he was acting in violation  
24 of Abercrombie's policies. You saw all the training. The  
25 policies say diversity is very important to this company.

1 Respect is very important to this company. The policies all  
2 say that the company does not discriminate based upon religion.  
3 If Mr. Johnson said the things that is claimed he said, he  
4 acted in violation of Abercrombie's policies.

5 Actually, the evidence shows that Mr. Johnson's  
6 mindset wasn't that he wanted to discriminate against Muslim  
7 people. Remember, Ms. Sepahvand was Muslim and was already  
8 working in the store. Mr. Johnson was simply trying to protect  
9 the brand and enforce this very important Look Policy, which is  
10 central to the Company's business. And you heard a ton of  
11 evidence about the Look Policy and how important it is to this  
12 company. In fact, you have heard Dr. Kathleen Lundquist, an  
13 expert, testify that an Abercrombie model who doesn't comply  
14 with the Look Policy is like a typist who can't type or a truck  
15 driver who can't drive.

16 To Abercrombie, the Look Policy is like the formula  
17 for Coca-Cola, it's the entire key to the company's success,  
18 and exceptions to the Look Policy are like changing the formula  
19 to Coca-Cola. It's not something you want to take lightly and  
20 it's bad for the business. Mr. Johnson was trying to protect  
21 the business, he was not trying to discriminate against  
22 Muslims.

23 Now, the other thing that's clear from all the  
24 evidence is that this issue should have been rolled up to HR by  
25 someone. That's how Cooke was trained, that's how Ms.

1 Sepahvand was trained and that's how Johnson was trained. And  
2 you heard Ms. Seely make some representations about the  
3 training. Those representations are not true. You heard the  
4 evidence over and over and over, if religion is raised at all  
5 by anyone, call HR. And that's the training, the training  
6 there in front of you. I refer you to Exhibit 10. And there  
7 is training on religious accommodation, it's right there, it's  
8 in evidence. The representation that Ms. Seely made that  
9 there's no training on religious accommodation is not a true  
10 representation.

11 Now, you also heard the evidence about what happens  
12 when issues get rolled up to HR. A trained human resources  
13 manager considers the issue and these things get resolved.  
14 Abercrombie has make exceptions for religious reasons when the  
15 HR department is involved. You heard about exceptions made for  
16 Muslim employees. You heard about an exception made for a war  
17 veteran with a battle scar and you heard about an exception  
18 made for someone with cancer. I think that we all know that if  
19 HR had been called, we probably wouldn't be here in the  
20 courtroom today and that's bad communication, but it's not  
21 because of bad people or bad policies.

22 Now, you have heard Ms. Seely complaining about  
23 Abercrombie's hiring and interview procedures. And the EEOC  
24 has even suggested that Abercrombie's managers should be  
25 trained to ask applicants about religion and trained to make

1 assumptions about religion.

2           Anyone who has ever interviewed people knows you can't  
3 ask an applicant about their religion, you can't make an  
4 assumption about religion. If Abercrombie trained its managers  
5 to ask questions about religion or to make assumptions about  
6 religion, you can be pretty sure that we would be here in this  
7 court getting sued about that.

8           Now, you heard the evidence that Abercrombie's hiring  
9 procedures, training and interview script were drafted by an  
10 outside expert, Kathleen Lundquist. And Dr. Lundquist is very  
11 highly regarded. In fact, she's so highly regarded that she  
12 has been hired by the government before. She has even been  
13 invited to testify before the EEOC. In other words, this is  
14 someone who the government respects. And Dr. Lundquist told  
15 you that she drafted Abercrombie's procedures, the ones that  
16 we've been talking about throughout this whole trial, in  
17 compliance with the EEOC's guidelines and in compliance with  
18 existing law. And she explained that the best practice for an  
19 employer is to explain the expectations of the job to an  
20 applicant and then ask the applicant if she has any question  
21 about the expectations. That's when an applicant is supposed  
22 to raise a religious issue, so that the manager doesn't have to  
23 ask about religion. And that's exactly what Abercrombie's  
24 policy is.

25           Now, you have also heard Ms. Seely complaining about



1 Abercrombie's training, but Deon Riley explained the training  
2 to you. Abercrombie has trained experts who are highly trained  
3 on religious accommodation, they work in HR. It's their job to  
4 handle these kind of issues and it's just impossible for an  
5 employer to train thousands and thousands of managers on all of  
6 the legal issues involved in a business.

7           Think about how much time we've spent in this  
8 courtroom wrestling about the legal issues in this one case.  
9 There's no way to train thousands of managers on every legal  
10 issue that could come up and that's exactly why Abercrombie  
11 trains its managers to roll issues up to the experts in HR.  
12 Think about it, if you need brain surgery, would you rather go  
13 to an expert surgeon or someone who's job it is to focus on  
14 sales? My guess is you would rather have your issue go to the  
15 expert. And the training works, exceptions have been made.  
16 You saw the evidence of the exceptions for religious  
17 accommodation. The training didn't work in this case because  
18 of bad communication, but not because of a bad policy.

19           What happened here was the result of bad  
20 communication, but Ms. Cooke is not a bad person, Mr. Johnson  
21 is not a bad person, and Abercrombie's policies aren't bad  
22 either. Under these facts and under this evidence, there's no  
23 reason to award punitive damages and there's no reason to  
24 punish Abercrombie. You should not award punitive damages to  
25 Ms. Elauf.

1           Now, the second type of damages that the EEOC seeks  
2           are compensatory damages. And they claim that Ms. Elauf  
3           suffered emotional pain and suffering, and the judge has  
4           instructed you that you may award damages only for injuries  
5           that the EEOC proves were caused by Abercrombie. And I want to  
6           emphasize that the EEOC has to prove damages. And the judge  
7           has also instructed you that if you find that Ms. Elauf's  
8           injuries have no monetary value, then you must award her a  
9           nominal amount of one dollar.

10           There's no evidence that Ms. Elauf suffered damages  
11           from any of this and the EEOC has definitely not proved  
12           damages. The EEOC admits, and the judge has instructed you,  
13           that Ms. Elauf did not lose any money or pay. That's because  
14           she got two different jobs in less than five days after her  
15           interview with Abercrombie.

16           Now, we've all been through some tough times. Here,  
17           Ms. Elauf didn't get the job she claimed she wanted at  
18           Abercrombie, but she got two other jobs five days after her  
19           interview. If you-all are like me, you've probably been  
20           through worse in your lives. Can you really say that Ms. Elauf  
21           was damaged here? And ask yourselves how much did she want the  
22           job at Abercrombie, anyway? Her best friend told her one thing  
23           about the interview, don't wear black. But what did Ms. Elauf  
24           do? She wore a black headscarf and black shoes to the  
25           interview. Ask yourselves, if you have a job interview for a

1 job you really want and your best friend tells you one thing  
2 not to do, are you going to do that one thing? If you're told  
3 not to wear jeans to an interview, are you going to go ahead  
4 and wear jeans anyway? And remember, Ms. Elauf was  
5 interviewing at other jobs before she even knew she didn't get  
6 the job at Abercrombie. She had a job at Old Navy before Ms.  
7 Sepahvand even told her that she didn't get the job at  
8 Abercrombie. Ms. Elauf was not sitting at home holding her  
9 breath waiting to be called by Abercrombie.

10 Simply put, the EEOC has not proven that Ms. Elauf  
11 suffered emotional damages. We already know that she never  
12 went to a doctor, psychologist, or therapist. But what I think  
13 is even more telling is that although she text messages and  
14 Facebooks all the time, she never sent a text about any of  
15 this, not once in three years.

16 Ask yourselves, if something happened in your life  
17 that really bothered you, wouldn't you talk about it to your  
18 friends? Wouldn't you send at least one text? This was not  
19 big enough of a deal for Ms. Elauf to send a single text  
20 message.

21 Now, Ms. Elauf did testify that when she interviews,  
22 she's worried that people will think differently about her  
23 because of her headscarf. She said when she interviews. The  
24 problem with that is she hasn't interviewed with anyone for the  
25 past three years because she's been employed by Forever 21 the

1 whole time. It seems to me that Ms. Elauf just kind of made  
2 that testimony up out of thin air.

3 The best evidence of Ms. Elauf's mental state came  
4 from her best friend, Farisa Sepahvand, who testified here  
5 before you. Ms. Sepahvand didn't say that Ms. Elauf was  
6 crying. Ms. Sepahvand didn't say that Ms. Elauf was forever  
7 changed. Ms. Sepahvand didn't even say that Ms. Elauf was  
8 hurt. Ms. Sepahvand told you that Ms. Elauf moved on with her  
9 life. And that seems right. Ms. Seely asked you how Ms.  
10 Elauf's life has changed from 2008 to now. And the evidence is  
11 her life has not changed at all. The fact is that Ms. Elauf  
12 has a pretty good life. She has a job she likes, she has been  
13 promoted three times, she's going to school, she does community  
14 service, she wants to open her own clothing store, she has  
15 friends, and she has no medical issues.

16 Ms. Elauf was not damaged and the EEOC has not proven  
17 damages. The judge has instructed you that if the EEOC has not  
18 proven damages or that if Ms. Elauf's damages have no monetary  
19 value, that you must award Ms. Elauf one dollar. That's the  
20 evidence and that's exactly what you should do.

21 Thank you very much for your attention.

22 THE COURT: Thank you, Mr. Knueve. Ms. Seely.

23 MS. SEELY: Ladies and gentlemen, Mr. Knueve told you  
24 that in order to find Abercrombie liable for punitive damages,  
25 there has to be a pretty serious violation of the law. I

1 submit to you, ladies and gentlemen, that all the evidence in  
2 this case has shown that what happened to Samantha Elauf is a  
3 pretty serious violation of the law. It's discrimination based  
4 on religion and it's against the law. It's serious enough.

5 Now, I don't need to tell you or remind you that the  
6 closing statement that was read to applicants at Abercrombie  
7 said nothing about no headwear permitted. There was no reason  
8 why Samantha Elauf should have known that she couldn't wear the  
9 scarf that she had worn for a year and a half at two other  
10 employers without question, if she had gone to work for  
11 Abercrombie.

12 I want you to think about the evidence that Heather  
13 Cooke gave. Heather Cooke never testified that she was a  
14 friend of Samantha Elauf's. In fact, her testimony was that  
15 she knew who she was, she had seen her around the mall.

16 Now, Mr. Knueve put up on the TV screen a section or a  
17 part of the PSP, the People Selection Program, that defendant  
18 offered into evidence and it said the words "taboo topic." It  
19 said if a taboo topic is brought up, contact HR. I want to  
20 remind you that the PSP, the People Selection Program, was the  
21 document that pertained to hiring and interviewing. And what  
22 it said was that if a taboo topic was brought up, meaning by  
23 the applicant, the interviewing manager was to contact HR.  
24 This does not apply in the context of Heather Cooke, who went  
25 to her district manager and said Samantha needs to wear a

1 headscarf.

2           Mr. Knueve said that Deon Riley has trained experts in  
3 HR and she testified that it was impossible to train thousands  
4 of employees in every legal issue that comes up. Ladies and  
5 gentlemen, the EEOC is not here claiming that human resources  
6 at Abercrombie should have trained its managers on the ground  
7 in every single legal issue. But when it comes to religious  
8 accommodation, people who interview for Abercrombie need to  
9 know that religious accommodation is required and they need to  
10 know how to recognize that an applicant might need an  
11 accommodation. They need to recognize when a religious issue  
12 does come up. And that's the kind of training that Abercrombie  
13 never gave its managers on the ground. That was training it  
14 gave its HR managers in corporate headquarters and it depended  
15 upon these operating managers in the stores to roll it up to HR  
16 in order for the system to work. But if they didn't train the  
17 managers in the stores to roll it up, to recognize there was a  
18 religious issue, then there was no way that human resources was  
19 ever going to get involved and that anyone's request or  
20 anyone's need for a religious accommodation would be granted or  
21 even dealt with.

22           Now, I will say, with respect to Mr. Knueve's argument  
23 about compensatory damages, he said that it wasn't a big deal  
24 to Samantha because she didn't text about how she felt. Ladies  
25 and gentlemen, she testified that she talked to her friends and

1 family. I submit to you that this was a big enough deal that  
2 she thought it was too important to put in a text message, that  
3 she needed to have face-to-face communications with her family  
4 and friends, and that is she did.

5 Now, ladies and gentlemen, as the instructions tell  
6 you, compensatory damages are difficult to evaluate in terms of  
7 how much you should award. They're intangible. And I don't  
8 know what to tell you, it's going to be your decision on how  
9 much compensatory damages to award. There's no formula, but I  
10 might throw out that if you break it down, Samantha Elauf --  
11 it's been about a thousand days since June 25th when Samantha  
12 Elauf, in 2008, was denied the job at Abercrombie. So you  
13 might want to think about it as how much a day is Samantha  
14 Elauf's emotional distress worth. Is it worth \$50 a day, \$25 a  
15 day, is it worth more than that? It's some, just some way I  
16 suggest to you, you might want to think about it when you are  
17 deciding what to do. And you need to consider the fact that  
18 Samantha Elauf has not gotten over this and that she may hold  
19 this and carry this with her for the rest of her life.

20 Thank you, ladies and gentlemen. I appreciate your  
21 time.

22 THE COURT: Thank you, Ms. Seely.

23 Ladies and gentlemen, that completes the argument. If  
24 you'll turn with me to Jury Instruction No. 17.

25 This case is now submitted to you for your decision

1 and verdict. When you go to the jury room to begin considering  
2 the evidence in this case, you should first select one of the  
3 members of the jury to act as your foreperson. This person  
4 will help to guide your discussions in the jury room.

5 After you have reached a unanimous agreement on your  
6 verdict, your foreperson alone will sign it and you will, as a  
7 body, return with it into court. Forms of verdict will be  
8 furnished for your consideration and use.

9 If during your deliberations it becomes necessary to  
10 communicate with the Court, you may send a note by the bailiff.  
11 Bear in mind that you are not to reveal to the Court or to any  
12 person how the jury stands -- that should be "how" rather than  
13 "who." We'll change that on the original.

14 Bear in mind that you are not to reveal to the Court  
15 or to any person how the jury stands, numerically or otherwise,  
16 until you have reached your verdict.

17 The bailiff will now come forward to be sworn.

18 (Bailiff sworn).

19 THE COURT: Ladies and gentlemen, the courtroom will  
20 rise, assembled, as the jury retires to deliberate.

21 (The following proceedings were had outside the  
22 presence and hearing of the jury.)

23 THE COURT: Be seated, please. Counsel, when do you  
24 wish to put on additional evidence with regard to the requested  
25 injunctive relief?



1 MR. KNUEVE: Right now. Can you do it now?

2 MS. SEELY: Do you want us to call Deon or do you want  
3 to talk about it. I thought we were going to talk about  
4 possibly stipulating.

5 MR. KNUEVE: Yes, we might be able to stipulate, Your  
6 Honor.

7 THE COURT: All right. Let's recess for lunch, then.  
8 I have a judge's meeting and will not be out until after 1:00.  
9 We will talk when we reconvene then.

10 Is there anything else we need to address?

11 MR. KNUEVE: Not from defendant's perspective, Your  
12 Honor.

13 MS. SEELY: No, Your Honor.

14 THE COURT: Counsel are to be commended for their  
15 closing arguments. Is there anything else? Ms. Seely?

16 MS. SEELY: Not now, Your Honor. We will talk about  
17 the stipulations.

18 THE COURT: Very well. We are in recess.

19 MR. KNUEVE: Thank you, Your Honor.

20 (Recess).

21 (The following proceedings were had outside the  
22 presence and hearing of the jury.)

23 THE COURT: We're on the record. It is currently  
24 1:15. The Court received the following note from the jury, the  
25 time of the note was 12:45, but the Court received the note

1 soon after returning from a judge's meeting right around 1:00.  
2 The Court has conferred with the attorneys and has drafted a  
3 response agreed to by the attorneys.

4 For the record the note from the jury reads as  
5 follows. "Will Samantha Elauf have legal fees, question mark.  
6 If so, comma, are we allowed to differentiate between an amount  
7 awarded to cover legal fees and an amount awarded for her  
8 personal compensation, question mark."

9 The proposed response penned by the Court reads as  
10 follows: "Ms. Elauf does not have attorney fees, comma, as she  
11 is represented by the EEOC. But, comma, you are not to  
12 consider attorneys' fees in any way in connection with your  
13 verdict, period. You should only consider the instructions  
14 given to you in rendering your verdict, period."

15 Is that response satisfactory to the plaintiff?

16 MS. SEELY: Yes, it is, Your Honor.

17 THE COURT: And to the defendant?

18 MR. KNUEVE: It is, Your Honor.

19 THE COURT: All right. Thank you, very much. We will  
20 deliver that response to the jury. We are off the record.

21 (Recess).

22 (The following proceedings were had outside the  
23 presence and hearing of the jury.)

24 THE COURT: In an abundance of caution just to be  
25 ready, the Court has prepared a proposed jury instruction

1 relative to a second stage proceeding on punitive damages.  
2 Jury Instruction No. 18 plus a set of verdict forms, one for  
3 the plaintiff and one for the defendant. Are there any  
4 objections? Ms. Hope?

5 MS. HOPE: Yes, Your Honor, the plaintiff does have  
6 some objections.

7 THE COURT: All right.

8 MS. HOPE: In particular, the "factors to consider"  
9 language.

10 THE COURT: Yes.

11 MS. HOPE: Set forth. I believe that's taken from the  
12 ABA Model Jury Instruction. And, you know, I'll note that the  
13 language of Kolstad and the courts in this circuit have  
14 identified the language in the first part of this paragraph,  
15 which is that the purpose of punitive damages is to punish and  
16 deter.

17 It's my understanding that these aren't taken from  
18 Tenth Circuit caselaw or in holdings caselaw and I'll also note  
19 that some of these factors are just inapplicable in this  
20 circumstance. For instance --

21 THE COURT: All right. I agree with that. And would  
22 you agree potential profits are inapplicable?

23 MS. HOPE: Yes, I would, Your Honor.

24 THE COURT: All right, I take it Abercrombie has no  
25 objection to taking that out?

1 MR. KNUEVE: No, Your Honor.

2 THE COURT: All right. We will take that out. What  
3 else does the plaintiff contend is inapplicable with regard to  
4 factors? And I do -- I want to say I do think we've got to  
5 give them some guidance in terms of factors they may consider  
6 and if these are from the ABA Model Instruction, then I would  
7 ask the EEOC to suggest substitute factors that they may  
8 consider.

9 MS. HOPE: Well, I would like to at least make an  
10 addition and that is the last paragraph of our Model Jury  
11 Instruction No. 40, which is -- sets forth that the jury may  
12 consider the defendant's financial resources, in particular,  
13 the company's net worth, in determining what's an appropriate  
14 figure to punish and/or deter.

15 THE COURT: Don't we have that here?

16 MS. HOPE: We have, I guess, the effect of the damages  
17 award on defendant's financial condition.

18 THE COURT: Well, they can certainly consider  
19 financial resources, I mean that's a standard factor.

20 MS. HOPE: Oh, I'm sorry. You're right, I apologize.  
21 That is in there. So other than those, we don't have any  
22 additional objections.

23 THE COURT: All right. So the one thing I've done as  
24 a result of your suggestion, and we had thought you might  
25 suggest this, we've taken out the factor with regard to the

1 potential profits. Anything else?

2 MS. HOPE: No, Your Honor.

3 THE COURT: All right. Mr. Clark?

4 MR. KNUEVE: Your Honor, we actually object to the  
5 final sentence of the jury instruction. Although you can  
6 instruct the jury to consider the net worth, we don't believe  
7 that it is appropriate to do so in this case. We think that  
8 that is, it's just not justified by the facts and the  
9 circumstances in the case and we object.

10 THE COURT: All right. I think it's a standard  
11 consideration and I would be amenable to placing net worth in  
12 the list of factors, as opposed to highlighting it in a  
13 separate sentence. If the Court is inclined to add net worth  
14 here, would you agree that that ought to be included in the  
15 list of factors?

16 MR. KNUEVE: Your Honor, I believe that that's the  
17 kind of the last clause, the effect of the damages award on  
18 defendant's financial condition. I guess what we really object  
19 to is the jury being informed of the net worth of Abercrombie &  
20 Fitch. I think that that is totally out of proportion to the  
21 facts and circumstances given in this case.

22 THE COURT: Well, obviously there's a number of  
23 safeguards in that regard, but I think net worth is a standard  
24 consideration for a jury in affixing punitive damages. And I  
25 understand your objection, but to the extent that I give it,

1 would you agree that it ought to be listed in the list of  
2 factors, as opposed to highlighted in this last sentence?

3 MR. KNUEVE: Yes, I would, Your Honor.

4 THE COURT: All right. Any objection to that?

5 MS. HOPE: No, Your Honor.

6 THE COURT: All right. Anything else? Mr. Clark.

7 MR. KNUEVE: Your Honor, one thing I wanted -- it's  
8 not an objection to this instruction, but one other thing that  
9 I wanted to mention. The parties have been working out some  
10 stipulations on some of these issues and as I read the  
11 instruction, I see one of the factors is the attitudes and  
12 actions of defendant's top management after the misconduct was  
13 discovered. And some of the stipulations actually relate to  
14 conduct of the company after these events took place and I  
15 believe that the stipulation should be provided to the jury  
16 when they're considering punitive damages, if they do.

17 THE COURT: I'm not sure I fully understand, but Ms.  
18 Seely, your response?

19 MS. SEELY: I would disagree, Your Honor. This case  
20 is about what happened prior to June 25th, 2008 and it is not  
21 about what the company is currently doing, except with respect  
22 to the Court's decision on injunctive relief and that is for  
23 the Court to hear and not for the jury to hear.

24 MR. KNUEVE: Your Honor, let me explain a little bit  
25 more fully. The instruction indicates that a factor that the

1 jury may consider are the attitudes and actions of defendant's  
2 top management after the misconduct was discovered. And the  
3 time stipulations that I'm talking about are the fact that  
4 after all of these events took place, Abercrombie modified its  
5 associate handbook.

6 THE COURT: I think that's entirely proper and that's  
7 a standard consideration for juries in second stage  
8 proceedings. Are you suggesting, then, that but for the  
9 stipulation, you would have no other way to address it in the  
10 second stage?

11 MR. KNUEVE: Your Honor, we can have Deon -- Ms. Riley  
12 come in and testify.

13 THE COURT: I think that's what you need to do if  
14 she's not willing to stipulate. I'm not going to force her to  
15 stipulate. I can't.

16 MR. KNUEVE: I guess we can -- the parties can discuss  
17 stipulations, but if we can't stipulate, what I'm asking for is  
18 leave to present that type of evidence to the jury.

19 THE COURT: Oh, absolutely, that's what the second  
20 stage would be for, in part. Go ahead, Ms. Seely.

21 MS. SEELY: Your Honor, this is a surprise to me. Mr.  
22 Knueve did not tell me that these stipulations would be -- that  
23 he was going to propose that they be read to the jury and I'm  
24 going to have to take a look at them with a new eye.

25 THE COURT: Yes, I understand. You thought that the

1 stipulations were intended to be presented to the Court in  
2 connection with the request for injunctive relief?

3 MS. SEELY: That's correct, Your Honor.

4 THE COURT: All right, that's fine, I understand that.  
5 I'm glad it came up now.

6 MS. SEELY: So am I.

7 THE COURT: So let me make these changes. We will get  
8 this ready in the event they check that they do find that the  
9 plaintiff has met its burden with regard to punitive damages.

10 Oh, and one other thing that we did not mention on the  
11 record, but I wanted to make sure that the record reflected.  
12 The language of the special interrogatory concerning punitive  
13 damage claims was language that counsel for both parties  
14 proposed and agreed to in the informal jury instruction  
15 conference; correct? Ms. Seely?

16 MS. HOPE: Yes, that's correct.

17 THE COURT: Ms. Hope?

18 MS. HOPE: I'm sorry, yes, that's correct, Your Honor.

19 THE COURT: Thank you. And Mr. Clark?

20 MR. KNUEVE: I'm sorry, Your Honor. What are you  
21 referring to?

22 THE COURT: Oh, the special interrogatory on the  
23 verdict form that we sent back with the jury. This language,  
24 "we do, do not, check one, find by a preponderance of the  
25 evidence that the plaintiff has proven that Ms. Elauf is



1 entitled to punitive damages." That was language that was  
2 hammered out in the informal conference this morning and it was  
3 a variation from that which the Court originally proposed and  
4 this language was agreed to by the parties; correct?

5 MR. CLARK: Yes, sir.

6 THE COURT: Very good. Thank you, very much. We will  
7 make those changes. What about the portion of the trial  
8 addressed to injunctive relief or any further evidence on  
9 injunctive relief? Ms. Seely?

10 MS. SEELY: If we agree to the stipulations we have  
11 been discussing, Your Honor, then the plaintiff will have no  
12 additional evidence. And I would assume.

13 MR. KNUEVE: That is true, Your Honor.

14 MS. SEELY: So if we can talk about that.

15 THE COURT: But for Ms. Riley, possibly; correct?

16 MR. KNUEVE: Your Honor, if the jury enters -- comes  
17 back and we get to a second stage.

18 THE COURT: No, I'm talking now about injunctive  
19 relief.

20 MR. KNUEVE: If we can work out these stipulations,  
21 Ms. Riley won't need to testify again.

22 THE COURT: I see. Got it. Okay. I'm now confusing  
23 second stage with additional evidence on injunctive relief.  
24 All right. Thank you, very much. And I'll come back here  
25 after we get this jury instruction hammered out and I will find

1 out whether you wish to merely present the stipulation with  
2 regard to injunctive relief.

3 You might also discuss amongst yourselves whether you  
4 would like to make some argument to the Court with regard to  
5 injunctive relief. Thank you.

6 Ms. Seely, I'm sorry to interrupt, but one more thing.  
7 Any objection to the verdict forms? I just want to make  
8 absolutely clear for the record, the proposed verdict forms in  
9 the second stage. Ms. Hope.

10 MS. HOPE: That's fine, Your Honor.

11 THE COURT: Mr. Clark.

12 MR. KNUEVE: No objection.

13 THE COURT: Thank you.

14 (Recess).

15 (The following proceedings were had outside the  
16 presence and hearing of the jury.)

17 THE COURT: Be seated please. We are here relative to  
18 the request for injunctive relief, and as the Court previously  
19 stated, the Court would entertain evidence during jury  
20 deliberations with respect to the request for injunctive relief  
21 that could not be presented to the jury.

22 The plaintiff may call its first witness.

23 MS. SEELY: The plaintiff calls Deon Riley.

24 MR. KNUEVE: I'm sorry, Your Honor. I thought we had  
25 agreed to the stipulations.

1 THE COURT: I had, as well, but I was told that there  
2 was some problem that if Riley was going to testify in the  
3 punitive damage second stage, if that were to occur, that the  
4 plaintiff would not stipulate with regard to injunctions, which  
5 doesn't make any sense to me, but if the plaintiff can't agree,  
6 I can't force her to agree.

7 MS. SEELY: Well, Your Honor --

8 MR. KNUEVE: It's fine, she'll testify.

9 THE COURT: Ms. Riley, if you will approach, please.

10 MS. SEELY: Your Honor, perhaps we could resolve this.  
11 My big issue is I can agree to make these stipulations that we  
12 have discussed if Ms. Riley is not going to be testifying  
13 before the jury.

14 THE COURT: We don't know whether she is or not. The  
15 jury will have to answer yes on the special interrogatory, but  
16 in the meantime, I've got time that I'm burning, I've got lots  
17 of other cases and I need to use this time, so we need proceed.

18 MS. SEELY: Okay, Your Honor. Your Honor, we will  
19 stipulate to --

20 MR. KNUEVE: Well, no, Deon come on up. That's fine.

21 MS. SEELY: Okay.

22 DEON RILEY

23 Called as a witness on behalf of the plaintiff, having been  
24 previously sworn, testified as follows:

25 THE COURT: Ms. Riley, let me remind you you remain

1 under oath.

2 THE WITNESS: Yes, Your Honor.

3 THE COURT: Ms. Seely, you may inquire.

4 MS. SEELY: Yes.

5 DIRECT EXAMINATION

6 BY MS. SEELY:

7 Q. Ms. Riley, am I correct that in the winter or March of  
8 2010, that human resources or the company made some changes in  
9 the closing statement of the Model Group Interview Guide?

10 A. Yes.

11 Q. And do you recall the changes in the closing statement?

12 A. Yes, we clarified and included the statement that headwear  
13 is prohibited.

14 Q. Okay. Is it true that in the closing statement of the  
15 Model Group Interview Guide, as of March 2010, the sentence was  
16 added "headwear of any kind is not permitted"?

17 A. That's correct.

18 Q. Were there any other changes made to the closing  
19 statement, at that time, from the statement that has been  
20 admitted into evidence in the Model Group Interview Guide in  
21 this case?

22 A. No.

23 THE COURT: Let me just interject here, Ms. Riley. I  
24 don't have that, I don't believe, before me. Does that mean  
25 that headwear is not permitted in the interview or does that

1 mean that the interviewer is to inform the applicant that  
2 headwear of any kind is not permitted.

3 THE WITNESS: It would be the latter, Your Honor. It  
4 was a clarify of that Look Policy summary that's read at the  
5 end of the interview, prior to the interviewing manager asking  
6 are there any questions.

7 THE COURT: Thank you.

8 THE WITNESS: So it was a clarification.

9 THE COURT: Thank you. Ms. Seely, go ahead.

10 Q. (By Ms. Seely) So if an applicant comes to the interview  
11 now and is wearing a headscarf, is it true that that applicant  
12 is told that headwear of any kind is prohibited by the Look  
13 Policy?

14 A. Yes, they read the statement which says that.

15 Q. Now, is it true also that the practice continues to be  
16 that the interviewing manager is not supposed to ask the  
17 applicant wearing a headscarf if she needs a religious  
18 accommodation?

19 A. That's correct.

20 Q. And is it true that currently, the interviewing manager is  
21 still not supposed to ask the applicant anything about the  
22 headscarf?

23 A. They don't ask about the headscarf. They read the  
24 statement and then they ask whether or not the individuals who  
25 are applying for the role have any questions.

1 Q. And is it true that the practice continues to be now that  
2 the interviewing manager, in the situation where the applicant  
3 wears a headscarf, is trained not to take notes to indicate  
4 that the applicant is wearing a headscarf?

5 A. They do not take notes.

6 Q. Now, isn't it true that the practice continues to be that  
7 the interviewing manager is supposed to call human resources  
8 only if the applicant requests an accommodation, that being to  
9 wear the headscarf?

10 A. That's not true.

11 Q. If the applicant wearing the headscarf does not raise the  
12 issue of religion or the headscarf, isn't it true that the  
13 interviewing manager is currently not supposed to call HR?

14 A. That's not true.

15 Q. Can you tell me what is true, then?

16 A. What is true is that our managers are instructed, whether  
17 or not the individual applicant asks for religious  
18 accommodation or any other taboo/protected class items, that if  
19 they have any questions in their mind whatsoever, they need to  
20 call HR.

21 Q. And if they have no questions in their mind, they don't  
22 need to call HR; correct?

23 A. If they have no questions in their minds, then they don't  
24 have to call HR.

25 Q. So if an applicant comes to an interview now, wearing a

1 headscarf and the applicant doesn't ask a question relating to  
2 the headscarf - of the interviewing manager - the interviewing  
3 manager is supposed to do nothing; correct?

4 MR. KNUEVE: Objection, Your Honor. Mischaracterizes  
5 the testimony that just occurred.

6 THE COURT: Just one second. The objection is  
7 sustained, rephrase.

8 Q. (By Ms. Seely) If the interviewing manager -- strike  
9 that. Am I correct that currently, the interviewing manager is  
10 still supposed to take into consideration the fact that an  
11 applicant is wearing a headscarf, in making the rating for  
12 appearance and sense of style?

13 A. I think I testified earlier that although you talked about  
14 the rating from one to three, that we do not expect anyone who  
15 turns up for the interview to be in total compliance. That's  
16 one of the reasons we read the Look Policy summary and that is  
17 one of the reasons we ask if there are any questions. So it's  
18 not just purely one. If someone has a sense of style, is  
19 well-groomed and is beautiful and is wearing a headscarf, we  
20 don't ask them to make the assumptions that the individual is  
21 not willing to adhere to the Look Policy if they are hired.

22 MS. SEELY: Excuse me.

23 THE WITNESS: That's fine.

24 Q. (By Ms. Seely) Ms. Riley, the current Model Interview  
25 Guide, is it your testimony that it has not changed from the

1 interview guide that was offered into evidence as Defendant's  
2 Exhibit 2, except with respect to the statement in the closing  
3 statement we have already discussed?

4 MR. KNUEVE: Objection, asked and answered.

5 MS. SEELY: I'm talking about the whole guide, now.

6 MR. KNUEVE: That question was asked and answered.

7 THE COURT: All right. As I understand it, the  
8 question is other than what we've just discussed, nothing else  
9 has changed. Is that --

10 MS. SEELY: The question is other than the additional  
11 statement that's been added to the closing statement in the  
12 interview guide, has anything else in the Model Group Interview  
13 Guide that is currently in use, changed from the Defendant's  
14 Exhibit 2.

15 THE COURT: Overruled. You may answer.

16 A. Not that I'm aware of.

17 Q. (By Ms. Seely) Now, am I correct then that on the rating  
18 sheet for appearance and sense of style in the current Model  
19 Interview Guide, that the language -- that there is still  
20 language in the below expectations column that says that an  
21 applicant is to be graded a one if she does not wear  
22 attractive, stylish, fashionable clothes and hair style, makeup  
23 and accessories or wears clothes that are inconsistent with the  
24 Abercrombie brand?

25 A. It still says that.



1 Q. And is it your testimony that today, Abercrombie believes  
2 that a headscarf is inconsistent with the Abercrombie brand?

3 A. It is inconsistent with our Look Policy.

4 THE COURT: What page is that on, Ms. Seely?

5 MS. SEELY: Your Honor, the current Model Interview  
6 Guide is not in evidence. It was not listed on the plaintiff's  
7 exhibit list, so I'm simply trying to elicit testimony about it  
8 from Ms. Riley.

9 THE COURT: All right. But it's not listed in the  
10 pretrial order, at all?

11 MS. SEELY: No, it's not, Your Honor. May I approach  
12 the witness, Your Honor?

13 THE COURT: You may.

14 Q. (By Ms. Seely) Ms. Riley, I've handed you what's been  
15 marked as Plaintiff's Exhibit No. 20. Can you tell me what  
16 that document is?

17 A. This is our store manager training that we did in the fall  
18 of 2010.

19 Q. And is this the current store manager training that is  
20 done every fall?

21 A. This is the training specifically to fall 2010.

22 Q. Have you done a more recent training for store managers  
23 than fall 2010?

24 A. No, we train each fall, so the next time will be fall  
25 2011.

1 Q. So Exhibit 20 represents the training, the most recent  
2 training that's been given to store managers; am I correct?

3 MR. KNUEVE: Objection. This is a specific type of  
4 training, not all the training.

5 THE COURT: All right. Rephrase, please.

6 Q. (By Ms. Seely) Does Exhibit 20 contain a summary of the  
7 store manager training done in your training sweep as of fall  
8 2010?

9 A. Yes, it does.

10 Q. Now, Ms. Riley, is there any page in Exhibit 20 that  
11 refers to the company's obligation to provide religious  
12 accommodation?

13 A. I'm sorry, just a moment. I'm just going through the  
14 sections.

15 Q. All right.

16 MR. KNUEVE: Your Honor, I wouldn't object if Ms.  
17 Seely directed the witness to the page.

18 MS. SEELY: Well, I don't think there is a page.  
19 That's why I would like the witness to look.

20 A. If you go to A&F 3300, the top of this is titled "what's  
21 the scenario". You will see that we --

22 MS. SEELY: Just a second, Ms. Riley. Plaintiff  
23 offers Plaintiff's Exhibit 20 into evidence, Your Honor.

24 THE COURT: Any objection?

25 MR. KNUEVE: No objection, as long as it's solely for

1 purposes of injunctive relief.

2 THE COURT: Yes, of course. Plaintiff's 20 admitted  
3 solely for injunctive relief purposes.

4 Q. (By Ms. Seely) Now, Ms. Riley, you referred me to page  
5 37; is that correct?

6 A. That would be correct.

7 Q. Okay. And where on page 37 is religious accomodation and  
8 the company's obligation to provide religious accommodation  
9 mentioned?

10 A. If you go down to scenario number four.

11 Q. Yes.

12 A. You will see that we included in the training, this is  
13 role plays and this one says "You interview Jackie, who is a  
14 great looking model applicant. Her interview went extremely  
15 well. Under normal circumstances, you would have given her the  
16 highest score for appearance and sense of style. However,  
17 Jackie showed up to the interview wearing a headscarf. After  
18 covering the Look Policy in the interview, Jackie asked if her  
19 headscarf would be an issue. How do you address the  
20 situation?"

21 We train our managers that if she addresses the issue  
22 in any way, they would need to call HR. And if they think that  
23 there may be an issue, whether it's just in their mind or an  
24 inkling or a clarification or whatever the reason may be, in  
25 much the same way they call HR for everything else, they need

1 to call HR.

2 Q. Now, in scenario number four, it says that Jackie, the  
3 applicant, asked if her headscarf would be an issue; correct?

4 A. That's correct. But in the role play, as I just stated  
5 earlier, we instruct with all of our managers that whether  
6 Jackie asks or whether they just think. So, for example, we  
7 get this all the time. I have a fabulous looking young woman  
8 who I want to hire, she's wearing a headscarf. What do you  
9 think I should do? Call HR.

10 Q. But the scenario in Exhibit No. 4 only refers to a  
11 situation where the applicant, Jackie, asks if her headscarf  
12 would be an issue; correct?

13 MR. KNUEVE: Objection, Your Honor. Asked and  
14 answered and the document speaks for itself.

15 THE COURT: Sustained. Let's move on.

16 MS. SEELY: Okay.

17 THE COURT: You can touch on this, but that question,  
18 the document does speak for itself.

19 Q. (By Ms. Seely) Now is there any other page in Exhibit 20,  
20 Ms. Riley, that references the company's or refers to the  
21 company's obligation to provide religious accommodation?

22 A. The only other page is if you -- that I can see at the  
23 moment, is if you go to, I think it's A&F 3314, we ask all of  
24 our managers, Your Honor, to go back to the stores and make  
25 sure that all the managers in their stores are aware of what

1 they have been trained on. And in that one -- if you look at  
2 the second bullet point, I'm sorry, the second phrase, it says  
3 "get the facts." It says "increase your awareness, understand  
4 company policies and how you can best accommodate the diverse  
5 needs of your associates while meeting the needs of the  
6 business." And it's in that that we reiterated that if they  
7 had any questions whatsoever that were implied, asked, just in  
8 their head, they needed to make sure they got all the facts and  
9 that they spoke to us about it.

10 THE COURT: All right. Let me ask in that regard,  
11 because it would appear from this exchange between Ms. Seely  
12 and yourself that unless the applicant asks a question, the  
13 interviewer will downgrade the applicant, because the applicant  
14 is not -- and let me see if I can get the exact language, here.  
15 "Is wearing clothes that are inconsistent with the Abercrombie  
16 brand;" correct?

17 THE WITNESS: Right.

18 THE COURT: Okay. Let's take two scenarios because  
19 obviously, Ms. Seely is thinking, as she should as a good  
20 advocate, about a Muslim woman who is applying. And you are  
21 saying that if she applies, if the Muslim woman applies and  
22 otherwise meets all of the standards, if she is wearing a  
23 headscarf and she does not ask the question or imply the  
24 question in some way, she will not be hired. Is that what I  
25 understand you're saying?

1 THE WITNESS: No, Your Honor, what I have been trying  
2 to convey to Ms. Seely is that as you take a look at the  
3 document -- she has dwelled on one part of the document. The  
4 interview is in totality.

5 THE COURT: All right.

6 THE WITNESS: So even in the last two years, I know of  
7 at least eight or nine cases where a manager has met someone  
8 who met all the requirements and specific to headscarves, I'm  
9 not sure if the individual is Muslim or not, they said they  
10 meet all the requirements outside of this particular piece of  
11 the Look Policy, what should we do? We instruct them to call  
12 us immediately.

13 THE COURT: So those were questions raised by the  
14 interviewer with HR without a question being raised by the  
15 interviewee?

16 THE WITNESS: That's correct.

17 THE COURT: All right. So if Audrey Hepburn applies,  
18 all right, and we would assume that Audrey Hepburn, if she were  
19 19 years old, might meet your qualifications; right?

20 THE WITNESS: I think she definitely would, even at 44  
21 years old.

22 THE COURT: I think you're probably right. We used  
23 Grace Kelly, earlier, but Audrey Hepburn shows up and she's  
24 wearing a headscarf. Now, if she doesn't ask the question  
25 about the headscarf, you're not going to ask about her

1 religion; correct?

2 THE WITNESS: No, I'm not going to ask.

3 THE COURT: But then you would hope that the  
4 interviewer would put in the call to you and say look, but for  
5 the fact that she's wearing clothes inconsistent with the  
6 Abercrombie brand, i.e. Audrey's headscarf, what should I do?

7 THE WITNESS: Yes. And the scenarios, Your Honor,  
8 just to give you a history, the scenarios are actually taken  
9 from real cases that we've had. So we do have this happen  
10 frequently where people call and say I have a wonderful young  
11 man, he has to wear a beard or he has a beard, he looks Jewish.  
12 I didn't ask. What should I do? He meets all the  
13 requirements.

14 So I think what has been conveyed is that store  
15 managers only call us because there's a script. We get 25,000  
16 calls a year. They call us for everything. An average store  
17 manager is about 25 years old, they have been out of school for  
18 three years. It's one of the reasons we take a lot of the  
19 expertise in-house is because they don't have the tenure of an  
20 IBM or a Procter & Gamble, where they can live through these  
21 experiences.

22 THE COURT: They don't have a degree from Wellesley  
23 and a doctorate?

24 THE WITNESS: Actually, there are quite a few of them  
25 with degrees. Well, we only people who are degreed, but we are

1 usually their first job that they get out of college and they  
2 move very quickly up the ranks, so we tell them to call us for  
3 everything, and literally we get called for everything.

4 THE COURT: Which is what you want?

5 THE WITNESS: Yes.

6 THE COURT: All right. Ms. Seely, go ahead.

7 Q. (By Ms. Seely) Ms. Riley, I believe you testified that  
8 there have been eight or nine situations since 2008 in which  
9 someone has been hired with a headscarf; correct?

10 A. Eight or nine that I'm aware of Ms. Seely.

11 Q. And is it your testimony, then, in each of those -- strike  
12 that. Are you familiar with the details of each of those eight  
13 or nine occasions?

14 A. I have read them. Quite honestly, I cannot tell you all  
15 the details of them. The gist is that there's a mixture of  
16 people asking and people not asking. But our training in March  
17 2010 and onward has always been if you have any inkling,  
18 whether a question is asked, whether you just have something in  
19 your head or whether you just don't know, you just need to call  
20 us.

21 Q. Now, you say that your training since March 2010 has been  
22 call us if you have something in your head?

23 A. We've always said that. I don't think it's been very  
24 clear to people, so we were very clear in training our district  
25 managers and then we trained all our store managers in the 2010



1 training sweep. So yes.

2 Q. But the Exhibit 20, the fall 2010 store manager training  
3 booklet, that reflects the most current training; is that  
4 correct, for store managers?

5 A. That reflects the most current store manager training.

6 Q. Yes.

7 A. That's correct.

8 Q. And we've discussed the only portions of that document  
9 that pertain, in your view, to the obligation to provide  
10 religious accommodation?

11 A. Based on the time I just reviewed this now, those are the  
12 two pieces I could point out.

13 Q. Do you need more time?

14 A. It probably would take me about half an hour just to read  
15 it.

16 Q. You are familiar with it, are you not?

17 A. Yes, Ms. Seely, I am familiar with it, but I'm also  
18 familiar with probably 30 or 40 other training documents that  
19 we have used since then.

20 MR. KNUEVE: Your Honor, we are getting a little  
21 badgering, argumentative here. If there's a point to be made,  
22 let's make it.

23 THE COURT: Sustained.

24 Q. (By Ms. Seely) So just so the record is clear, of the  
25 eight or nine instances that you are aware of in which women

1 were allowed to work for Abercrombie wearing a headscarf, it is  
2 not your testimony that every one of them -- strike that. Some  
3 of those applicants actually made a specific request during the  
4 interview to wear a headscarf; correct?

5 A. Yes, some of those applicants asked.

6 Q. And do you know specifically which applicants did not ask,  
7 but the interviewing manager thought to call HR, nonetheless?

8 A. No. No, I do not.

9 MR. KNUEVE: Objection, Your Honor, relevance.

10 THE COURT: Yes, we're getting a little bit beyond the  
11 bounds of relevance here. The objection is sustained. Let me  
12 ask, do you know how many of those eight or nine were as a  
13 result of phone calls from the interviewer as opposed to  
14 request for accommodation by the interviewee?

15 THE WITNESS: No, Your Honor, I don't know how many.

16 THE COURT: All right. Go ahead.

17 Q. (By Ms. Seely) Now, Ms. Riley, isn't it true that since  
18 2008, there have been at least two situations in which an  
19 applicant or an employee has either not been hired or been  
20 fired because she wore a headscarf?

21 MR. KNUEVE: Objection, Your Honor, relevance.

22 THE COURT: Sustained.

23 MS. SEELY: Your Honor, if I may respond?

24 THE COURT: Go ahead, but we're getting beyond, we're  
25 getting into the California case here. Go ahead. I'm not

1 intending to try anything other than what's relevant before me.  
2 Go ahead, respond to the objection.

3 MS. SEELY: Well, Your Honor, I think it's relevant  
4 because Ms. Riley is testifying that the company is allowing  
5 headscarves now and implying that they no longer discriminate  
6 on the basis of headscarves with respect to anyone, and I think  
7 it's relevant to show that there are at least two people who  
8 claim that they have been discriminated against because of  
9 their headscarves since 2008.

10 MR. KNUEVE: Your Honor, this is so far out of the  
11 scope of this case in controversy, it's ridiculous. The EEOC  
12 put into evidence at summary judgment evidence that the company  
13 has made eight or nine exceptions for hijabs. Now, Ms. Seely  
14 is getting into stuff she knows happens before 2010.

15 THE COURT: Those are the subject of other lawsuits.  
16 The objection is sustained. Go ahead.

17 MS. SEELY: No more questions, Your Honor.

18 THE COURT: Mr. Knueve.

19 CROSS-EXAMINATION

20 BY MR. KNUEVE:

21 Q. I'm not going to belabor anything, Ms. Riley, I'm just  
22 going to ask you a couple of questions. Are you familiar with  
23 a company document called the Hair Style Sketch Book?

24 A. Yes, I am.

25 Q. What is that document?

1 A. That document shows or trains our managers on hair styles  
2 and headscarf styles that may be accommodated if someone  
3 requires accomodation for religious or medical reasons.

4 Q. Does it say anything about headwear?

5 A. Yes.

6 Q. What does it say?

7 A. It says we will try to make the right accommodations.

8 Q. Now, who is that provided to?

9 A. That's provided to managers and pretty much anyone who  
10 does any hiring.

11 Q. Now, you have described a number of changes the company  
12 has made in or around the beginning of 2010; correct?

13 A. Yes.

14 Q. Why did the company make those changes?

15 A. We wanted to make sure that there was no further confusion  
16 from anyone who is an applicant or a manager.

17 MR. KNUEVE: No further questions.

18 THE COURT: Redirect.

19 MS. SEELY: No, Your Honor.

20 THE COURT: Very well, you may step down.

21 THE WITNESS: Thank you.

22 THE COURT: The plaintiff may call its next witness.

23 MS. SEELY: No more witnesses, Your Honor.

24 THE COURT: Very well. The defendant may call its  
25 first witness.

1 MR. KNUEVE: No witnesses, Your Honor.

2 THE COURT: Very well. Any argument? Ms. Seely.

3 MS. SEELY: Yes, Your Honor. Your Honor, whether or  
4 not to issue injunctive relief is within this Court's  
5 discretion and the standard is whether or not the evidence  
6 shows that there exists some cognizable danger of recurrent  
7 violations. I think the evidence is clear that defendant's  
8 current policies and procedures regarding religious  
9 accommodations to applicants who wear headscarves continues to  
10 be flawed and will likely result in continued discrimination  
11 against applicants for store positions who wear headscarves  
12 because of their religious beliefs.

13 Nothing has changed, Your Honor, in the way that the  
14 company conducts interviews and makes hiring decisions. The  
15 only thing that has changed is that the Look Policy block on  
16 the new current Model Interview Guide tells the applicant that  
17 no headwear is allowed to be worn. The onus is still placed on  
18 the applicant who is hearing a headscarf to ask for an  
19 accommodation. And the problem is that I think that most of  
20 the people who are applying for jobs at the abercrombie stores  
21 are teenagers. And if someone comes to an interview wearing a  
22 headscarf and is told by an older person, a manager, that no  
23 headwear is allowed, I think it's highly likely that those  
24 people will not ask for an accommodation, they won't even know  
25 that that's a possibility.

1           And it's our position that Abercrombie should be  
2 required, that an injunction should issue requiring Abercrombie  
3 to follow up that statement, the statement being no headwear is  
4 allowed, with a statement that if you need religious  
5 accomodation, please see me after the interview. And at that  
6 point in time, the interviewing manager then will contact HR  
7 because a request has been made.

8           I don't think anything has changed in Abercrombie's  
9 interviewing procedures at all since 2008, except that now,  
10 applicants are told they can't wear headwear. I think there's  
11 definitely a danger that recurrent discrimination will occur.

12           We also ask that the company train its managers in  
13 their obligation to inform all applicants that they may ask for  
14 religious accommodation and also train their managers in the  
15 company's obligation to provide a religious accommodation so  
16 that they may recognize when one is needed, so that they know  
17 when there's a religious issue, short of an express request for  
18 accommodation.

19           THE COURT: Thank you. Mr. Knueve.

20           MR. KNUEVE: Your Honor, a lot has changed since 2008  
21 and we just heard what has changed. The Look Policy has  
22 changed to clarify that headwear is not permitted. The Model  
23 Group Interview Guide has been changed so that no applicant can  
24 ever be confused as to whether or not headwear is permitted by  
25 the Look Policy. The applicant is read language that

1 specifically states headwear is prohibited, then they are asked  
2 if they have questions. There can be no further confusion.

3 The other things that have changed are the training  
4 that was described by Ms. Riley. There was training to all  
5 managers that the company -- and it's exactly the situation of  
6 this case, that headwear can be permitted as a reasonable  
7 accommodation. It's what Ms. Seely has been saying or talking  
8 about for two days. The company has done it.

9 And then, in addition, what's been introduced into  
10 evidence is the store manager training sweep which specifically  
11 provides training on this scenario that we've been talking  
12 about.

13 Now, the relief that the EEOC requests far exceeds the  
14 scope of this case in controversy. As Your Honor said, this  
15 case was decided based upon facts and circumstances unique to  
16 this particular case. The company has insured that the facts  
17 and circumstances that relate to this case can never happen  
18 again, because no applicant can ever be confused about whether  
19 or not headwear is permitted. To the extent Ms. Elauf was  
20 confused about whether headwear was permitted by the Look  
21 Policy, that will never happen again. We're outside the scope  
22 of this case and the injunctive relief is inappropriate.

23 Furthermore, the EEOC has made no showing that  
24 violations are likely to recur. In fact, the evidence is  
25 exactly the opposite. The evidence is that the company has

1 made eight to nine exceptions for hijabs since 2010. There is  
2 no evidence of any likelihood of a recurring violation. And I  
3 would cite you to the case KarenKim 2011 U.S. Dist. Lexis  
4 64487, which says that the burden is on the EEOC to prove that  
5 violations are likely to recur.

6 The other problem with the injunctive relief requested  
7 by Ms. Seely is that it exceeds the scope of Title VII. What  
8 she is asking for is not required by law. And again, I will  
9 refer you to the EEOC's own compliance manual which says in  
10 black and white, the applicant cannot remain silent. And I'm  
11 quoting, this is from the EEOC's own compliance manual:

12 "An applicant or employee who seeks religious  
13 accommodation must make the employer aware, both of the need  
14 for accommodation and that it's being requested due to a  
15 conflict between religion and work. The employee is obligated  
16 to explain the religious nature of the belief or practice at  
17 issue and cannot assume that the employer will already know or  
18 understand it." That's what the EEOC has written. There's  
19 nothing in Title VII, nothing, that justifies the relief that  
20 has been requested here.

21 Finally, the relief requested is moot because, as Ms.  
22 Riley testified, the company has taken steps to address the  
23 situation that happened in this case. This case is about the  
24 facts and circumstances relating to Ms. Elauf, that's it.  
25 Those circumstances are not going to recur. There has been no



1 evidence here that they will. Thank you.

2 THE COURT: Thank you. The Court will decline to  
3 enter an injunction here. The Court concurs with Mr. Knueve,  
4 the facts and circumstances here have changed. The Look Policy  
5 has changed to change the prohibition from caps to headwear, so  
6 that it's clear. The Model Interview Guide has changed,  
7 instructing the interviewers to tell the interviewees that no  
8 headwear is to be worn. And in addition, the interviewee is to  
9 be asked if they have questions. Just as the EEOC states in  
10 its guidelines, the applicant cannot remain silent.

11 Here, the particular facts were such that the Court  
12 found and, as specifically set forth in the Court's written,  
13 what 23, 24 page order on summary judgment, that under the  
14 facts here, Ms. Elauf could not have been reasonably required  
15 to ask that question herself or to ask for reasonable  
16 accomodation. First of all, she was 18 years old. Had she  
17 read the Look Policy, which was not provided to her, it said  
18 caps weren't allowed, which arguably, doesn't apply to  
19 headscarves. I think to an 18 year old teenager, a cap isn't  
20 necessarily stylish and certainly a headscarf can be.

21 Secondly, if Abercrombie now complies with its current  
22 policy of telling its applicants that no headwear is to be  
23 worn, that reasonably places the applicant on notice that they  
24 need to ask, that they cannot remain silent with regard to  
25 their religious belief in wearing headwear.

1           The evidence before this Court indicates that managers  
2           are now instructed that headwear may be permitted as a  
3           reasonable accommodation and that if questions arise, that they  
4           are to call HR. I also agree with Mr. Knueve here that there  
5           is no substantial likelihood of recurrent violations, and I'm  
6           not saying that under no circumstances will recurrent  
7           violations ever occur, but that's what cases and controversies  
8           are for. There is no cognizable danger of recurrent violations  
9           of the type presented by the facts here where Ms. Elauf was not  
10          placed on reasonable notice that she needed to request an  
11          accommodation for her headscarf.

12                 With due respect, the request for an injunction will  
13          be denied. Anything further?

14                 MS. SEELY: No.

15                 THE COURT: All right. Have we heard anything from  
16          the jury, Mr. Overton?

17                 THE CLERK: No, we have not.

18                 THE COURT: Very well, we are in recess.

19                 (Recess).

20                 (The following proceedings were had outside the  
21          presence and hearing of the jury.)

22                 THE COURT: Be seated please. The Court has received  
23          a note with the time of 4:15 p.m. stating that "We, the jury,  
24          have reached a verdict." Is there anything we need to take up  
25          before we retrieve the jury?

1 MS. SEELY: No, sir.

2 MR. KNUEVE: No.

3 THE COURT: Very well.

4 (The following proceedings were had in the presence  
5 and hearing of the jury.)

6 THE COURT: Please be seated. Mr. (Jury Foreperson -  
7 name omitted), it's my understanding that the jury has reached  
8 a verdict. Is that correct, sir?

9 JURY FOREPERSON: Yes, we have, Your Honor.

10 THE COURT: And it is a unanimous verdict, sir?

11 JURY FOREPERSON: Yes, sir.

12 THE COURT: Very well. If you will hand the verdict  
13 to the bailiff, the Court will review it to make sure it's in  
14 proper order.

15 All right, the Court has reviewed the verdict and  
16 finds that it is in proper order. The Court will hand the  
17 verdict to Mr. Overton for publication on the record to the  
18 courtroom assembled. Mr. Overton.

19 THE CLERK: "In the United States District Court for  
20 the Northern District of Oklahoma. Equal Employment  
21 Opportunity Commission, plaintiff vs. Abercrombie & Fitch  
22 Stores, Inc., an Ohio corporation doing business as abercrombie  
23 kids, defendant. Case number 09-CV-602-GKF-FHM. Verdict form.

24 "We the jury, empaneled and sworn in the above  
25 entitled cause, do upon our oaths award compensatory damages

1 for plaintiff and against defendant Abercrombie & Fitch Stores,  
2 Inc. in the amount of \$20,000.

3 "Interrogatory concerning punitive damages. We do not  
4 find by a preponderance of evidence that plaintiff has proven  
5 that Ms. Elauf is entitled to punitive damages. Signed by the  
6 jury foreperson. Dated July 20th, 2011.

7 THE COURT: Does either counsel wish to poll the jury?

8 MS. SEELY: No, Your Honor.

9 MR. KNUEVE: No, Your Honor. Thank you.

10 THE COURT: Very well. Ladies and gentlemen, just for  
11 your understanding, the parties have a right to poll the jury,  
12 both have declined to do so. Polling the jury would be having  
13 the Court ask each of you, individually, whether this verdict  
14 represents your personal verdict in the case.

15 Ladies and gentlemen, you have now completed your  
16 duties as jurors in this case and you are discharged. Now, the  
17 question may arise as to whether or not you are free to discuss  
18 this case with anyone. Let me inform you of the rules of this  
19 Court. No one may contact you with regard to your verdict and  
20 your deliberations unless that individual has first obtained  
21 specific permission from this Court to do so.

22 In nearly five years of being in this court, I have  
23 never been asked for permission to contact jurors and it would  
24 not be my proclivity to grant such a request because jury  
25 deliberations, in my view, are sacrosanct. Now, if you,

1 yourself, wish to approach anyone, talk to your family, your  
2 friends, your neighbors or the lawyers involved in the case,  
3 that's entirely your decision, but that has to be initiated by  
4 you and not from anyone else.

5 If anyone attempts to contact you regarding your  
6 verdict and continues to do so over your objection, please  
7 contact me or Mr. Overton and I will immediately address the  
8 situation.

9 Ladies and gentlemen, we thank you very much for  
10 resolving this controversy. I know, by the amount of time that  
11 you spent with it, you considered it closely and did your duty  
12 as jurors to try to reach the truth in this case. We very much  
13 appreciate the sacrifice of your time and you are discharged.

14 (The following proceedings were had outside the  
15 presence and hearing of the jury.)

16 THE COURT: Is there anything else for the record?

17 MS. SEELY: No, Your Honor. Thank you.

18 MR. KNUEVE: No, Your Honor.

19 THE COURT: Very well. We are adjourned.

20 (Court adjourned.)

21

22 A TRUE AND CORRECT TRANSCRIPT.

23

24 CERTIFIED: s/ Glen R. Dorrough  
25 Glen R. Dorrough  
United States Court Reporter